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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of Section 73.202(b)

Table of Allotments

FM Broadcast Stations

(Rosendale, New York)

MM Docket No. 93-17

RM-8170

To: The Commission

MOTION FOR CLARIFICATION AND/OR FURTHER REVIEW

State University of New York ("SUNY"), by its counsel, submits this Motion for Clarification and/or Further Review in response to the attached Memorandum Opinion and Order, DA 98-18 ("Second MO&O"), released January 9, 1998 by the Chief, Policy and Rules Division. Because the Second MO&O was issued by Staff in response to a Petition for Reconsideration of a Commission decision, SUNY seeks clarification as to whether the Second MO&O was meant by the Commission as its final response to SUNY's requests for review in this matter.^{1/} If not, SUNY requests that the Commission review the matter again based on the previous pleadings.

1/ SUNY is simultaneously filing a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. Regardless of the Commission's clarification of the procedural aspects of this matter, unless there is a substantive reversal by the Commission, SUNY intends to seek judicial relief for the errors it believes have been made by the Commission.

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On August 1, 1997, SUNY requested reconsideration of the Memorandum Opinion and Order in MM Docket No. 93-17, RM-8170 (July 2, 1997) ("First MO&O"), insofar as the Commission upheld a decision of the Staff not to modify the license of SUNY's station WFNP, Rosendale, New York, to specify operation on the newly allotted FM Channel 273A at Rosendale, as requested by SUNY pursuant to Section 1.420(g). SUNY pointed out that there is another resolution of this matter that would serve the public interest: the allotment of a second channel (FM Channel 255A) for the various mutually exclusive applicants on Channel 273A and the reservation of Channel 273A for noncommercial educational use, thus permitting the WFNP license to be modified as SUNY has requested. SUNY also stated that it would accept a license modification for WFNP on Channel 255A, permitting the Channel 273A applications to proceed on that channel.^{2/}

On January 9, 1998, the Chief, Policy and Rules Division, not the Commission, released the Second MO&O, dismissing the Petition on the grounds that it did not present changed facts or circumstances.

^{2/} Oppositions to the Petition pointed out an inadvertent typographical error in the SUNY Petition. By using the caption from an earlier document filed by SUNY in this proceeding, counsel for SUNY mistakenly addressed the pleading to the Mass Media Bureau. SUNY filed an Erratum on September 19, 1997, clarifying that its pleading was indeed directed to the full Commission, which alone has the authority to reconsider the matter. SUNY pointed out that neither of Sections 1.106 and 1.429, which govern petitions for reconsideration, impose a specific requirement concerning pleading captions and addressees. The rules merely state that petitions requesting reconsideration of a final Commission action *will be acted upon* by the Commission. In similar contexts, the Commission has determined that a procedural mistake that does not have any substantive impact on the parties' rights will not serve as a basis for dismissing a petition or disregarding its substantive merits. See U.S. West Communications, Inc., 10 FCC Rcd 12592, 12593 (1995).

SUNY has no desire to prolong the span of this proceeding before the Commission. As noted in footnote 1, SUNY has filed for review of the Commission's decisions by the U.S. Court of Appeals. However, in order to avoid any claim that SUNY has failed to exhaust administrative remedies or to obtain a final appealable order, SUNY seeks to confirm whether the Second MO&O is intended by the Commission as its final pronouncement in this matter. If so, SUNY will prosecute its court appeal based on the record as it exists.

If the Commission chooses to review the Second MO&O and issue its own decision, SUNY urges that it do so based on the "Petition for Reconsideration" filed August 1, 1997.

Respectfully submitted,

STATE UNIVERSITY OF NEW YORK

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February 9, 1998

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 93-17
Table of Allotments,)	RM-8170
FM Broadcast Stations.)	
(Rosendale, New York))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 5, 1998

Released: January 9, 1998

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by the State University of New York ("SUNY") directed to the Memorandum Opinion and Order in this proceeding, 12 FCC Rcd 10020 (1997). Sacred Heart University, Inc. and Aritaur Communications, Inc. each filed an Opposition to Petition for Reconsideration. SUNY filed a Reply. For the reasons discussed below, we dismiss the Petition for Reconsideration.

Background

2. At the request of SUNY, licensee of noncommercial educational Station WFNP, Channel *204A, Rosendale, New York, the Notice of Proposed Rule Making, 8 FCC Rcd 947 (1993), proposed the allotment of Channel 273A to Rosendale, and modification of the Station WFNP license to specify operation on Channel 273A. In the Notice, we noted that should another party express an interest in providing Rosendale with an additional local service, Channel 255A would be available for allotment. We observed that SUNY had not requested that Channel 273A be reserved for noncommercial educational use. We also stated that Commission policy generally does not permit the reservation of a commercial channel for noncommercial educational use except where channels in the reserved portion of the FM band (Channels 201-220) are not available due to Channel 6 interference or preclusion by a foreign allotment. For these reasons, we requested that SUNY provide information regarding the availability of channels in the noncommercial educational FM band and clarify whether it seeks to have Channel 273A allotted on a commercial or noncommercial educational basis. In response to the Notice, SUNY filed comments reiterating its intention to apply for the channel, if allotted. SUNY also stated that it did not want Channel 273A reserved for noncommercial educational use even though it will

continue to operate Station WFNP as a noncommercial educational station.

3. The Report and Order, 10 FCC Rcd 11471 (1995), did not modify the noncommercial educational license of Station WFNP to operate on Channel 273A. Instead, it allotted Channel 273A to Rosendale and opened a filing window.¹ SUNY filed a Petition for Reconsideration directed to Report and Order. In a subsequent Memorandum Opinion and Order, we denied that Petition for Reconsideration. 11 FCC Rcd 3607 (1996). Thereafter, the Commission denied an Application for Review directed to that staff action. In doing so, the Commission determined that SUNY could not use Section 1.420(g) of the Rules to modify a noncommercial educational license.² The Commission also determined that allotting Channel 273A to Rosendale and opening a filing window was consistent with an earlier action in Sioux Falls, South Dakota, 51 FR 4169, February 3, 1986, and provided the greatest public interest benefit.

4. On August 1, 1997, SUNY filed this Petition for Reconsideration with the Chief, Allocations Branch, directed to the Commission action denying its Application for Review. In its Petition for Reconsideration, SUNY contends that the Commission decision "did not address one aspect" of its Application for Review which would permit modification of the Station WFNP license consistent with the Commission interpretation of Section 1.420(g) of the Rules. Specifically, SUNY now requests that we modify its license to specify operation on Channel 273A reserved for noncommercial educational use and allot Channel 255A to Rosendale in order to accommodate the pending applications for the Channel 273A allotment. In this regard, SUNY refers to its January 26, 1996, Consolidated Reply to the Oppositions to its original Petition for Reconsideration. In that Reply, SUNY stated, for the first time, that it would now accept a Channel 273A reserved for noncommercial educational use.

5. We dismiss the Petition for Reconsideration. The first argument set forth in this Petition for Reconsideration is repetitive with respect to an argument already considered by the Commission. The Commission clearly determined that the provisions of Section 1.420(g) of the Rules which permit a commercial FM station to modify its license to a nonadjacent channel are not available to a noncommercial educational station. Second, SUNY's willingness to accept Channel 273A reserved for noncommercial educational use after the adoption of the Report and Order does not represent changed facts or circumstances, or facts unknown to SUNY which normally permit entertaining a Petition for Reconsideration of a Commission action denying an

¹SUNY is one of ten applicants for the Channel 273A allotment at Rosendale, New York. Two other applicants propose to operate Channel 273A as a noncommercial educational station. In this situation, Sacred Heart University has filed an application proposing to operate Channel 273A as a noncommercial educational station while Aritaur Communications has filed an application proposing a commercial service.

²In Modification of FM and TV Licenses, 56 RR2d 1253 (1984), the Commission adopted the procedure which permits an FM station to modify its license through a rulemaking proceeding to a nonadjacent channel provided there is an equivalent channel to accommodate any expression of interest in the proposed FM channel. This procedure is now set forth in Section 1.420(g) of the Rules.

Application for Review.³ SUNY could have requested prior to the Report and Order that its Station WFNP license be modified to Channel 273A as a noncommercial educational channel. To the contrary, it specifically requested that Channel 273A not be reserved for noncommercial educational use. In this situation, we do not believe that it would be in the public interest to permit SUNY to request that its license be modified to a commercial allotment, without entertaining competing expressions of interest, and, once an unfavorable decision is rendered, submit an untimely alternative request to have its license modified to Channel 273A reserved for noncommercial educational use. In addition to being unfair to the other nine applicants who have filed applications for the Channel 273A allotment based upon our action in the Report and Order, such a procedure would be contrary to the public interest benefit of an orderly and efficient transaction of Commission business. See Colorado Radio Corp. v. FCC, 118 F.2d 24 (D.C. Cir.1941); Idaho Broadcasting Consortium, Inc., 11 FCC Rcd 5264 (1996).

6. Accordingly, pursuant to Section 1.106(b)(3) of the Commission's Rules, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by the State University of New York IS DISMISSED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

³Section 1.106(b)(2) of the Rules reads as follows:

"(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Motion for Clarification and/or Further Review" was served this 9th day of February, 1998, by hand delivery or First Class United States mail, postage prepaid, upon the following:

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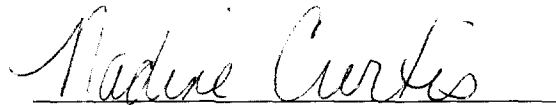
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